Supreme Court, U. S.
FILED
JUN 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1713

JOSEPH P. KENDALL,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION-
SPARROWS POINT YARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF BETHLEHEM STEEL CORPORATION-SPARROWS POINT YARD IN OPPOSITION TO PETITION

THOMAS E. CINNAMOND
RUDOLPH L. ROSE
SEMMES, BOWEN & SEMMES
10 Light Street
Baltimore, Maryland 21202
(301) 539-5040

Attorneys for Respondent,
Bethlehem Steel Corporation-
Sparrows Point Yard.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
STATUTE INVOLVED	4
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
REASONS FOR DENIAL OF WRIT OF CERTIORARI	8
CONCLUSION	10

TABLE OF CITATIONS

Cases

Arthur Murray Studio of Wash. v. F. T. C., 458 F.2d 622 (5th Cir. 1972)	9
Owens v. Traynor, 274 F. Supp. 770 (D. Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962	3
United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 73 S. Ct. 67, 97 L. Ed. 54 (1952)	9
Venn v. Todd Shipyards Corp., 2 BRBS 86 (1975)	9
Welch v. Leavey, 397 F.2d 189 (5th Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969)	3

Statutes

5 U.S.C. §554	9
28 U.S.C. §1254(1)	2
28 U.S.C. §2350(a)	2
33 U.S.C. §901 *et seq.*	2, 4
33 U.S.C. §902(10)	3

	PAGE
33 U.S.C. §908(c)	4
33 U.S.C. §921(c)(21)	3

Rules

Supreme Court Rules, Rule 19	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1713

JOSEPH P. KENDALL,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION-
SPARROWS POINT YARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF BETHLEHEM STEEL CORPORATION-SPARROWS POINT YARD IN OPPOSITION TO PETITION

OPINIONS BELOW

The unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit[1] affirmed the Order of the Benefits Review Board (A. 5-10), which in turn had affirmed the Decision and Order of the Administrative Law Judges below, that the Claimant suffered no further disability (A. 11-30, 35-40), under the

[1] The Opinion is set forth in the Petitioner's Appendix (A. 3-4).

Longshoremen's and Harbor Workers' Compensation Act.[2]

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 26, 1977, and the Petition for Certiorari was not filed within 90 days thereafter, as required by 28 U.S.C. §§1254(1), 2350(a). The Petitioner did not seek a stay of the mandate of the Fourth Circuit pending the Petition for Rehearing, which Petition was summarily denied by the Fourth Circuit on March 4, 1977 (A. 2).

Four successive determinations by two Administrative Law Judges, the Benefits Review Board and the United States Court of Appeals for the Fourth Circuit have reiterated that Kendall did not sustain a loss of wage-earning capacity and that the denial of compensation in this case was clearly supported by substantial and overwhelming evidence[3] in the record considered as a whole. Therefore, he was not entitled to permanent partial disability benefits under the Longshoremen's and Harbor Workers' Compensation Act.

The United States Court of Appeals for the Fourth Circuit, which received extensive briefs and heard oral argument, concluded from its independent review of the

[2] Codified in 44 Stat. 1424, 33 U.S.C.A. §§901 *et seq., as amended* in 1972 ("the Act" or "LHWCA"); references herein are to Code sections, but it will be observed that the Code sections are the statute sections codified in a 900 series in the United States Code Annotated.

[3] Although there are various allegations and arguments contained within the Petition for Writ of Certiorari, filed herein, the thrust of the Petition simply indicates disagreement with the factual determinations below, which were sustained at each successive level of review, and is an obvious effort to involve this Court in an independent and impermissible *de novo* review of the sufficiency of the evidence.

record that the decision of the Board denying the claim should be affirmed and that the merits of the case were so clearly supported by substantial evidence in the record below that a pro forma per curiam opinion would suffice (A. 4). They gave the Petitioner the shortest shrift in denying his Petition for Rehearing (A. 2).

The subject Petition is based upon misstatements of fact and misinterpretations of law of such import that the Petition is unreliable, inaccurate, misleading and totally lacking in candor.[4] Moreover, the Petition involves primarily the sufficiency of the evidence presented below and seeks to have this Court reweigh that evidence and reach factual determinations contrary to those made below and affirmed by the Fourth Circuit. The Petition herein does not present a question of conflict amongst circuits or a question of national importance. Thus, the Petition should be denied for failure to state or to present sufficient grounds for review by this Court. Rule 19, Supreme Court Rules.

QUESTION PRESENTED

Throughout this case, the Employer and Self-Insurer has successfully proven that the Claimant's anatomical impairment was not accompanied by a loss of wage-earning capacity and, therefore, that the employee has not suffered a disability compensable under the Longshoremen's and Harbor Workers' Compensation Act.[5] May this Court now reweigh and review the sufficiency of that evidence?

[4] The inaccuracies are to a large degree the same as presented below and commented upon by Administrative Law Judge Fath in his Decision and Order (A. 24-25, 27).

[5] 33 U.S.C. §§902(10), 908(c)(21). *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962; *Welch v. Leavey*, 397 F.2d 189 (5th Cir. 1968), *cert. denied*, 393 U.S. 1049.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, portions of which are contained in the Petitioner's Appendix (A. 40-45).[6]

STATEMENT OF THE CASE

The Petitioner (Employee-Claimant), Joseph P. Kendall, was injured on September 27, 1969. He filed a claim for Workmen's Compensation benefits under the LHWCA. The claim was contested from the Employer. After two days of hearings and after receipt of detailed briefs by the respective counsel, Administrative Law Judge Herman T. Benn denied the claim and found no loss of wage-earning capacity, *i.e.*, no "economic disability" as required under the Act (A. 39).

The Claimant appealed to the Benefits Review Board, which, on August 15, 1974, did not reverse the Decision of Judge Benn and did not question or modify his Findings of Fact, as the Petitioner erroneously contends,[7] but remanded the case for clarification on the narrow ground of whether Judge Benn had considered the possible future effects of the Claimant's injury on his wage-earning capacity (A. 32). Judge Benn retired and, in accordance with Administrative Law Judge procedures, with the request of the Petitioner's attorney the case was reassigned. Administrative Law Judge George A. Fath reviewed the transcript of testimony and exhibits in an exhaustive Opinion and Order (A. 11-30), which concluded that the evidence sustained Judge Benn's earlier determination that the claim

[6] The Act also provides for Appellate review of final Orders of the Benefits Review Board. 33 U.S.C. §921(c).

[7] The Petitioner erroneously argues before this Court that the Board's initial Order reversed Judge Benn and found as fact that the Claimant suffered disability (P. Br. 6-8). Therefore, the Petitioner's first, second and fourth questions presented to this Court are based on erroneous factual and legal predicates and are without merit (P. Br. 3-4).

should be denied. The Claimant again appealed to the Benefits Review Board, which, after oral argument, concluded that the record as a whole supported the finding that "the Claimant suffers no further disability." (A. 10). Thus, the claim was again denied. The third appeal was taken to the United States Court of Appeals for the Fourth Circuit, which received extensive briefs, reviewed the record, heard oral argument thereon and determined that there was substantial evidence to support denial of the subject claim (A. 4). A Petition for Rehearing by the Fourth Circuit was summarily denied (A. 2).

The Petitioner now seeks a fourth appellate review of the sufficiency of the evidence in the record considered as a whole, which in effect would require this Court to conduct an impermissible *de novo* reweighing of the evidence. Thus, the Petition is improper, without merit and should be denied.

STATEMENT OF FACTS

The Respondent will limit its Statement of Facts to correction and amplification of the Petitioner's Statement:

The Respondent accepts and refers this Court to the Findings of Fact of Administratve Law Judges Benn (A. 36-37) and Fath (A. 25-26). The Claimant, while working as a second-class rigger aboard ship on September 27, 1969, at a $157.33 average weekly wage, sustained an accidental injury to his back within the ambit of the Act.

Kendall had a long history of back problems prior to beginning work for Bethlehem Steel Corporation in 1968.[8] The evidence presented at the hearing before

[8] At the time of the hearing before Judge Benn, on December 4-5, 1974, Kendall was reluctant to admit to any prior back problems, until he was confronted on cross-examination with the appropriate medical records.

Judge Benn was that the employee was promoted to a second-class rigger on November 12, 1968, in which capacity he was injured on September 27, 1969. After care and treatment, the Claimant was released by his treating doctor and discharged with instructons to return to his work activities without any qualifications or restrictions. The Claimant returned to his second-class rigger duties at the Pier and did not lose any time from work, worked substantial periods of overtime and earned more than he had ever earned prior to his injury. Throughout his post-injury employment, this Claimant advanced himself by seeking better and more economically rewarding jobs until, at the time of the hearing before Judge Benn, he was earning more than he had ever made before and was working in a more prestigious occupation than he had ever held before. Moreover, his job security was greatly enhanced by Bethlehem Steel's willingness to keep the Claimant's rigger job open for him pending his return from his most recent executive position, as local representative to the Baltimore Area Chapter on Alcoholism in the AFL-CIO Department of Community Services to the National Council on Alcoholism, a $12,000.00 a year job.

Faced with the overwhelming evidence of a laudatory improvement by the Claimant in his working position and earnings ability, the Petitioner's attorney erroneously suggests that the Findings of Fact of Judge Benn that the Claimant had not sustained a loss of wage-earning capacity were reversed by the Benefits Review Board.[9] The Board did not question, modify or reverse Judge Benn's Findings of Fact, but merely requested a clarification as to whether the possible future effects of the injury had been presented and considered below (A. 32). Therefore, the Board expressly *remanded* the case

[9] See footnote 7, as to the Petitioner's misstatement of the Board's Order.

to the Administrative Law Judges, which, of course, was not a reversal of the findings below or of the decision denying compensation benefits.

Judge Benn retired and, in accordance with the Department of Labor Procedures, with the request of the Claimant's attorney the case was reassigned. Administrative Law Judge George A. Fath thoroughly reviewed the transcript of testimony and exhibits in his Decision, which concluded that the evidence sustained Judge Benn's earlier determination that the employee did not suffer economic disability under the Act, *i.e.* Kendall had no loss of wage-earning capacity (A. 28). The claim was again denied. Of course, the Petitioner's attorney did not object to the reassignment of Administrative Law Judges, since he had requested the same. His untimely challenge to the Administrative procedures did not arise until after he had received the claim denied decision of Judge Fath. The very procedures which he requested, he now characterizes as a "Kangaroo Court." (P. Br. 16). Obviously, this belated, desperate challenge to the Administrative procedures has not been properly presented below or preserved for Appeal, but, rather, has been waived.

The employee took a second Appeal to the Benefits Review Board, which, after a thorough review of the sufficiency of the evidence, complimented Judge Fath for his exhaustive review of the record and concluded that the record as a whole supported the finding that the "claimant suffers no further disability." (A. 10). The Claimant appealed to the United States Court of Appeals for the Fourth Circuit, which again reviewed the sufficiency of the evidence and affirmed denial of the claim below (A. 4). In a last tenacious gambit, dehors judgment, the Petitioner seeks to have this Court conduct an impermissible *de novo* reweighing of the sufficiency of the evidence presented below. Certainly,

this is not within the scope of this Court's certiorari jurisdiction.

REASONS FOR DENIAL OF WRIT OF CERTIORARI

The law is clear that the decision of the Administrative Law Judge, if supported by substantial evidence on the record as a whole, must be affirmed. Moreover, review of the sufficiency of the evidence is a matter for the lower courts and certainly is not an appropriate matter for this Court's exercise of certiorari. There is no need to reiterate the substantial and overwhelming evidence as to the Claimant's dramatic earnings rise in the years following his return to work, since this is undisputed and clearly establishes that his post-injury performance far exceeded his pre-injury occupation, earnings and earning ability. Therefore, it is clear from the facts and the law that Kendall's claim for compensation benefits under the Act was properly denied at each stage of the proceedings below.

Nor is there any conflict amongst the circuits as to the appropriate standard to be applied to determine disability under the Act. Although different facts may lead to different decisions on whether or not to award compensation benefits in any particular case, this case does not present any conflict which the Supreme Court should resolve. Therefore, the Petition must be denied.

The Petitioner's attorney attempts to cloud the real issue in the case, *i.e.*, sufficiency, as set forth above, by desperately and belatedly attacking the very remand procedure which he requested and expedited. The Petitioner's attorney never made any timely objection to the reassignment procedure, which he requested, nor requested a *de novo* hearing. It was only after he became dissatisfied with Judge Fath's Decision and Order that

the Petitioner complained of the procedures he requested. The conduct of the Petitioner's counsel clearly constitutes: an express consent to substitution of Administrative Law Judges; waiver of any objection to the procedures for reassignment; and waiver of any arguable necessity for a *de novo* hearing. Notwithstanding waiver, there has been no showing of substantial prejudice to the Claimant. *Venn v. Todd Shipyards Corp.*, 2 BRBS 86, 90 (1975). *See Arthur Murray Studio of Wash. v. FTC*, 458 F.2d 622, 624 (5th Cir. 1972); *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 37, 73 S. Ct. 67, 69, 97 L. Ed. 54 (1952).

Judge Benn, who heard the evidence and saw the witnesses, had made Findings of Fact sufficient to decide the case; Judge Fath was asked merely to clarify the extent of Judge Benn's Decision. The substitution of Judge Fath was in accordance with the Administrative Procedure Act, 5 U.S.C. §554 (1966), and the due process guarantee of the Fifth Amendment to the United States Constitution. The procedures on remand were precipitated by actions of the Petitioner's counsel, with his full understanding and appreciation and with his express agreement thereto. These procedures were entirely proper and well within the scope of the Board's Order on remand. The clarification of the record, made by Judge Fath, strictly followed the Board's directions and was entirely proper and supported by substantial evidence in the record considered as a whole.

Therefore, denial of the Kendall claim for compensation is supported by substantial evidence on the record as a whole and is procedurally unassailable. The subject Petition is without merit and should be summarily denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the subject Petition for Writ of Certiorari should be denied as improper and unnecessary and without the scope of this Court's jurisdiction.

Respectfully submitted,

Thomas E. Cinnamond

Rudolph L. Rose

Semmes, Bowen & Semmes

Semmes, Bowen & Semmes
10 Light Street
Baltimore, Maryland 21202
(301) 539-5040

Attorneys for Respondent,
Bethlehem Steel Corporation-
Sparrows Point Yard.